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Supreme Court, U.S.
FILED

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No. 04-

IN THE

Supreme Court of the United States

TIG INSURANCE COMPANY,

Petitioner,

v.

SECURITY INSURANCE COMPANY OF HARTFORD; TRUSTMARK INSURANCE COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a general state choice-of-law clause in a contract with an arbitration agreement that is subject to the Federal Arbitration Act renders inapplicable federal arbitration rules and instead incorporates state arbitration rules.

LIST OF PARTIES AND AFFILIATES

The parties are listed on the cover of this Petition. Pursuant to Rule 29.6 Petitioner TIG Insurance Company is a wholly owned subsidiary of Fairfax Holdings Limited, which is a publicly traded company.

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SECURITY INSURANCE COMPANY OF HARTFORD; TRUSTMARK INSURANCE COMPANY,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner TIG Insurance Company ("TIG") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 360 F.3d 322 (2d Cir. 2004) and appears in the Appendix to this Petition ("Pet. App.") at 1a-12a. The court of appeals' order denying the petition for rehearing en banc is unpublished and appears at Pet. App. 31a-32a. The district court's opinion is published at 283 F. Supp. 2d 602 (D. Conn. 2003) and appears at Pet. App. 13a-28a.

JURISDICTION

The district court had jurisdiction based upon federal diversity under 28 U.S.C. § 1332(a). The court of appeals had appellate jurisdiction to review the district court's entry of an order staying the arbitration proceedings pursuant to 9 U.S.C. § 16(a)(2). The court of appeals entered judgment on March 2, 2004, and denied a timely petition for rehearing and rehearing en banc on May 20, 2004. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, governs written agreements to arbitrate in contracts involving interstate commerce. Section 2 of the FAA is set forth at Pet. App. 33a.

California Civil Code of Procedure § 1281.2 is reprinted in its entirety at Pet. App. 33a-34a. Subsection (c) provides, in relevant part:

> If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

Id. at 34a.

STATEMENT OF THE CASE

The decision below presents this Court with a recurring legal issue that is critical to the proper application of the FAA to countless commercial contracts throughout the country. Review by this Court of the decision and judgment below is necessary because they conflict directly and irreconcilably with the decisions of other federal courts of appeals and with decisions of this Court. See Sup. Ct. R. 10(a)-(c).

A. This case presents the issue of what impact a general choice-of-law provision in a contract with an arbitration clause has on the application of the pro-arbitration rules and policies embodied in the FAA. A deep and persistent conflict among the courts of appeals has arisen on this issue in the wake of this Court's decisions in *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Standford Junior University*, 489 U.S. 468 (1989) and *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

The Second Circuit, in the decision below, and the D.C. Circuit both have relied upon *Volt* to hold that a general choice-of-law provision should be read to adopt state-arbitration rules rather than the otherwise applicable rules set forth in the FAA. Pet. App. 4a; accord *Ekstrom* v. *Value Health, Inc.*, 68 F.3d 1391, 1393 (D.C. Cir. 1995). In direct contrast, the Third Circuit, and the First, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits, have relied upon this Court's decision in *Mastrobuono* to hold that a general choice-of-law provision does not incorporate state arbitration rules and oust application of the FAA. *E.g.*, *Roadway Package Sys., Inc.* v. *Kayser*, 257 F.3d 287, 296 (3d Cir. 2001) (citing cases); *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1213 (9th Cir. 1998).[1] Numerous courts have

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[1] *See also PaineWebber Inc.* v. *Elahi*, 87 F.3d 589, 594 (1st Cir. 1996); *Porter Hayden Co.* v. *Century Indem. Co.*, 136 F.3d 380, 382-83 (4th Cir. 1998); *Action Indus., Inc.* v. *United States Fid. & Guar. Co.*, 358 F.3d 337, 343 (5th Cir. 2004); *Ferro Corp.* v. *Garrison Indus., Inc.*, 142 F.3d

highlighted the importance of this issue, and the court of appeals and district court below added their voices to that chorus, explaining that this issue has been a "fertile source of debate" that has resulted in "state and federal courts arriving at conclusions too varied to mention," Pet. App. 18a, with regard to "a recurring and troubling theme in many commercial contracts," *id.* at 1a.

B. Under the view adopted by the court of appeals, the practical impact of the FAA would be severely and improperly curtailed. As courts adopting the majority position have explained, (1) most commercial contracts with arbitration agreements contain general choice-of-law provisions, and (2) under the minority view, these choice-of-law provisions would be read to reincorporate state arbitration standards that the FAA was enacted to displace. Such a construction cannot be supported as a matter of the parties' intent because a general choice-of-law provision is not typically intended to address the interplay between state and federal law. Nor can the minority approach be reconciled with this Court's repeated admonition that "'any doubts'" concerning "'the construction of contract language'" "'should be resolved in favor of arbitration.'" *Mastrobuono*, 514 U.S. at 62 n.8 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)); *accord Volt*, 489 U.S. at 476 (in interpreting an agreement to arbitrate, "due regard must be given to the federal policy favoring arbitration").

Based upon the rationale of the court below, the FAA would apply only when the parties to contracts containing general choice-of-law provisions affirmatively excluded application of state arbitration rules and expressly stated their

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926, 937-38 (6th Cir. 1998); *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 995-97 (8th Cir. 1998); *Sovak* v. *Chugai Pharm. Co.*, 280 F.3d 1266, 1269-70 (9th Cir.), *opinion amended on denial of reh'g*, 289 F.3d 615 (9th Cir.), *cert. denied*, 537 U.S. 825 (2002); *Kelley* v. *Michaels*, 59 F.3d 1050, 1054-55 (10th Cir. 1995).

intention to be bound by the FAA. Such a holding runs contrary to this Court's conclusion that Congress intended the FAA to apply broadly to the full extent of its power under the Commerce Clause even when there is no showing that the parties contemplated that the FAA would govern their agreement to arbitrate. *E.g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995).

C. Finally, any doubt as to whether a general choice-of-law provision renders federal arbitration law inapplicable should be resolved, at a minimum, with appropriate deference to the arbitral panel's determinations. In *Mastrobuono*, this Court noted that in cases involving a "*federal* court's interpretation" of a contract subject to the FAA, the "only decisionmaker arguably entitled to deference" is "the arbitrator." 514 U.S. at 60 n.4 (distinguishing *Volt*, 489 U.S. at 474). Here, respondent sought and obtained a stay from the federal court only after the arbitral panel expressly rejected respondent's earlier request for a stay of arbitration.

Appropriate deference to the views of the arbitral panel follows from this Court's decisions explaining that arbitrators, rather than courts, presumptively must resolve procedural issues arising from the arbitration. Thus, in *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court explained that issues that arise out of an arbitration, such as contract interpretation, presumptively should be resolved by the arbitrator. *Id.* at 83-85 ("'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide."). [2] Thereafter, in *Green Tree Financial Corp.* v. *Bazzle*, a plurality of this Court emphasized the importance of this issue when it vacated a state-court decision and ordered,

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[2] *See also PacifiCare Health Sys., Inc.* v. *Book*, 123 S. Ct. 1531, 1535-36 (2003); *Green Tree Fin. Corp.* v. *Bazzle*, 123 S. Ct. 2402, 2408 (2003) (Breyer, J., plurality op.); *Vimar Seguros Y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 541 (1995).

sua sponte, that the arbitrator (rather than the court) interpret the parties' agreement. 123 S. Ct. 2402, 2408 (2003).

Here, the court of appeals engaged in contract construction to determine whether the parties had incorporated state arbitration procedures in their contract. This, however, was an issue for the arbitral panel. Indeed, it was only *after* the arbitral panel denied respondent Security's request for a stay of the arbitration proceedings that Security made the same request of the district court. The court of appeals, however, affirmed the district court's conclusion that the arbitral panel's denial of the request for a stay had no bearing on the resolution of the parties' dispute regarding the meaning of the arbitration agreement. Pet. App. 11a-12a. That ruling contravenes rulings by this Court and other courts of appeals.

Background

A. The Reinsurance Agreement. This case arises from an agreement ("Reinsurance Agreement") between TIG and Security Insurance Company of Hartford ("Security"), whereby Security agreed to indemnify TIG for a portion of TIG's liability arising out of certain workers compensation policies of insurance or reinsurance. The agreement was negotiated on Security's behalf by WEB Management LLC ("WEB"). The "territorial scope" of the Reinsurance Agreement is "worldwide." The Reinsurance Agreement contains an arbitration clause, which is included in the Appendix, hereto. Pet. App. 35a-36a. Given its broad territorial scope, and the transmission of premiums, accounts and claim payments between different states, there is no dispute that the Reinsurance Agreement "involve[s] commerce" within the meaning of Section 2 of the FAA.

The arbitration clause does not reference or incorporate state-law arbitration rules. Instead, it provides that "[a]s a condition precedent to any right of action hereunder, *any irreconcilable dispute between the parties to this Agreement* shall be submitted for decision to a board of arbitration

composed of two arbitrators and an umpire meeting [at] a place to be agreed by the board." Pet. App. 35a (emphasis added). The arbitration agreement sets forth the mechanism for the initiation of arbitration and explains that the arbitral board must be composed of "disinterested officials of insurance or reinsurance companies, or Underwriters at Lloyd's, London." *Id.* Timing is addressed with great care. The arbitration clause establishes a default briefing schedule and provides that, absent the "consent" of the parties, the arbitral board is obligated to render "its decision within 60 days following the termination of the hearings." *Id.* at 36a. At those hearings, "evidence may be introduced without following [the] strict rules of evidence but . . . cross-examination and rebuttal shall be allowed." *Id.* In reaching its decision, the arbitration clause provides that the "board shall make its decision with regard to the custom and usage of the insurance and reinsurance business." *Id.*

The Reinsurance Agreement also has a "Governing Law" clause that states: "This Agreement shall be governed by and construed according to the laws of the state of California, except as to rules regarding credit for reinsurance in which case the rules of all applicable states shall pertain thereto. Notwithstanding the foregoing, in the event of a conflict between any provision of this Agreement and the laws of the domiciliary state of any company intended to be reinsured hereunder, that domiciliary state's laws shall prevail."

Security also entered into a separate contract ("Retrocession Agreement") with Trustmark Insurance Company ("Trustmark") whereby Trustmark agreed to reinsure Security for 100% of the risk (subject to certain immaterial exclusions) that Security assumed from TIG under the Reinsurance Agreement. Pet. App. 2a. The Retrocession Agreement contains no arbitration clause. *Id.* WEB acted as agent for Security and Trustmark with regard to the Retrocession Agreement.

B. The Dispute. In November 2001, Trustmark informed Security that it believed that TIG had defrauded WEB in connection with the Reinsurance Agreement and suggested that Security rescind the Reinsurance Agreement. Security requested proof of the alleged fraud. Instead of providing proof, on November 26, 2001, Trustmark informed Security it was rescinding the Retrocession Agreement. The next day, Security filed a complaint against Trustmark in federal district court in Connecticut ("Federal Litigation"), seeking a declaration that Trustmark was not entitled to rescind the Retrocession Agreement. On May 3, 2002, Trustmark filed a third-party complaint against TIG, arguing that TIG defrauded WEB and thereby fraudulently induced Trustmark to enter into the Retrocession Agreement.

C. The Arbitration. On April 29, 2002, Security suspended further payments to TIG based on Trustmark's allegations of fraud. On June 27, 2002, TIG invoked the arbitration clause in the Reinsurance Agreement. After TIG and Security had chosen the arbitrators and umpire, and submitted positional papers to the arbitral panel, the arbitral panel adopted a briefing and hearing schedule that provided for an evidentiary hearing in New York to begin on August 11, 2003.

On May 5, 2003, Security filed a motion before the arbitration panel to stay the arbitration pending the outcome of the Federal Litigation. Security argued that a stay was appropriate because the Federal Litigation would "resolve all the issues pending in this arbitration." Motion at 1, 9. TIG opposed the stay because it was contrary to the terms of the Reinsurance Agreement and the Federal Arbitration Act. TIG explained that the motion, if granted, would "deprive TIG of its contractual right to arbitrate." Opposition to Stay at 5. Specifically, TIG pointed out that, under the arbitration agreement, disputes must be resolved by a "panel of 'officials of insurance or reinsurance companies'" applying the "'custom and usage of the insurance and reinsurance

business'" rather than a court or jury of laypersons applying "strict legal principles under state law in a federal trial court." *Id.* at 6-7 (quoting arbitration agreement). Finally, TIG explained that a stay of the arbitration would deprive TIG of a speedy and efficient resolution of its disputes with Security and that such speed and efficiency are among the principal reasons why these parties choose arbitration as their forum for dispute resolution. *Id.* at 11-12.

In reply, Security (1) acknowledged that "to date" it had not identified "any ground that it believes provides a valid basis to rescind the reinsurance agreement," and (2) asserted that it was "frivolous for Trustmark to attempt to rescind the retrocession agreement with Security based on allegations of wrongdoing directed at TIG." Reply at 6 & n.5. Security provided no response to TIG's showing that the FAA precluded Security's effort to rewrite the arbitration clause and never suggested that the arbitral panel was bound by California arbitration rules. On May 26, 2003, the arbitral panel rejected Security's request for a stay. Pet. App. 29a-30a. As a result, the hearing on the merits before the arbitral panel was scheduled to commence on August 11, 2003.

D. The District Court's Decision. On June 3, 2003, Security filed another motion for a stay of the arbitration, but this time with the federal district court in Connecticut. For the first time, Security argued that a stay was warranted because the arbitration provision contained in the Reinsurance Agreement was not subject to the limitations set forth in the FAA, but instead adopted California Civil Procedure Code § 1281.2(c), which, among other things, authorized a stay of the arbitration. TIG opposed the motion because "general choice-of-law provisions like the one here are insufficient as a matter of law to incorporate state arbitration procedural rules." Opposition to Stay at 2.

The district court issued a stay order that prevented the arbitration from going forward. It first highlighted that the question of a stay was not an issue of arbitrability, but instead

involved "the 'allocation of power between alternative tribunals.'" Pet. App. 21a n.5. It noted that "the import" of this Court's "*Mastrobuono* and *Volt* decisions is a fertile source of debate, with state and federal courts arriving at conclusions far too varied to mention here." *Id.* at 18a (footnote omitted). The court nevertheless highlighted that the Third Circuit and Ninth Circuit, "[i]n an effort to resolve conflicting interpretations, . . . have adopted a presumption 'that a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards.'" *Id.* (citing *Roadway*, 257 F.3d at 296, and *Sovak*, 280 F.3d at 1269). The district court, however, expressly rejected that approach and instead adopted the view that, under the FAA, state law alone "provides the tools by which the intent of the parties is ascertained." *Id.* at 21a.

The district court also rejected TIG's reliance upon the arbitral panel's denial of Security's motion for stay. The court concluded that the arbitral panel's denial of a stay had no bearing on a court's consideration of that issue. Pet. App. 27a-28a. TIG appealed the order staying arbitration under 9 U.S.C. § 16(a)(2).

E. The Court of Appeals' Decision. The court of appeals affirmed. Like the district court, the court of appeals also recognized that this "case presents a recurring and troubling theme in many commercial contracts: to what extent must a court—confronted with a choice-of-law provision in a contract—incorporate the designated state's statutory and common law governing arbitrations even when doing so seems contrary to the Federal Arbitration Act ('FAA')?" Pet. App. 1a.

After reviewing this Court's decisions in *Volt* and *Mastrobuono*, the court of appeals disagreed with the Ninth Circuit's conclusion that a general choice-of-law provision will not incorporate California's state-law arbitration rules, including California Civil Procedure Code § 1281.2(c). Pet.

App. 9a n.4 (rejecting holding in *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1212 (9th Cir. 1998)). The court below rejected *Wolsey* because "the Ninth Circuit relied on its interpretation of *Mastrobuono* to conclude that the choice-of-law provision did not incorporate section 1281.2(c)(4)." *Id.* Instead, the court of appeals believed that the "federal policy favoring arbitration" was inapplicable to its determination of how "California law interprets the choice-of-law provision utilized in this contract." *Id.* at 9a. Specifically, the court ruled that while the "federal policy favoring arbitration requires a specific reference to the restrictions on the parties' substantive rights or the arbitrator's powers to establish that the parties clearly intended to limit their rights under the FAA," *id.* at 8a-9a, this "federal policy favoring arbitration" does not apply in this case because "section 1281.2(c)(4) is a 'state procedural rule,'" *id.* at 9a.

Although entry of a stay would prevent the arbitral panel from issuing any decision, the court of appeals concluded that the California arbitration statute authorizing that interference with the arbitral process "does not limit . . . the arbitrator's power to resolve the dispute," Pet. App. 9a, or address the "'allocation of powers between the court and the arbitrator.'" *Id.* at 8a; see also *id.* at 7a. The court of appeals held that the "choice-of-law" clause "incorporate[d] the state's procedural rules for arbitration," *id.* at 11a, and ruled that "[i]f the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules," *id.*

TIG sought rehearing and rehearing en banc because (1) the court of appeals' holding about the impact of a general conflict-of-law clause was in direct conflict with decisions of a host of other courts of appeals, and (2) under *Howsam* and *Green Tree*, the proper interpretation of an agreement to arbitrate is a question for the arbitrator and not a court. On May 20, 2004, the court of appeals denied the petition for rehearing and rehearing en banc. Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

This case implicates significant legal issues concerning the proper scope and application of the Federal Arbitration Act ("FAA"). If left undisturbed, the decision below threatens to undermine proper application of the FAA in a broad array of commercial arrangements where parties have agreed to arbitrate disputes but also have included in their contracts a general choice-of-law provision.

In light of this Court's decisions in *Volt* and *Mastrobuono*, a deep and mature conflict has arisen with regard to the impact of general choice-of-law provisions in commercial contracts that contain written agreements to arbitrate. The First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits have relied upon this Court's decision in *Mastrobuono* to hold that the inclusion of a general choice-of-law provision in a contract containing an agreement to arbitrate will not oust application of the FAA in favor of state-law arbitration standards. *E.g.*, *Roadway Package Sys., Inc.* v. *Kayser*, 257 F.3d 287, 300 (3d Cir. 2001) (citing cases); *Wolsey Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1212 (9th Cir. 1998); see *supra* note 1 (setting forth cases adopting majority rule). In direct conflict, the Second Circuit (in the decision below) and the D.C. Circuit have held that general choice-of-law provisions should be interpreted to incorporate state-law arbitration rules at the expense of the FAA's protections. Pet. App. 7a-10a; *Ekstrom* v. *Value Health, Inc.*, 68 F.3d 1391, 1393 (D.C. Cir. 1995).

This case provides an ideal vehicle for resolving this conflict because, if the court below had adopted the majority approach, then California arbitration rules would not have been incorporated, and the FAA would have prevented the federal courts from interfering with the conduct of the arbitration. See *Roadway*, 257 F.3d at 300. Indeed, when presented with this same issue, the Ninth Circuit held that a general choice-of-law provision does not effectuate a

wholesale abandonment of the FAA in favor of California arbitration rules. *Wolsey*, 144 F.3d at 1212-13; see also *Sovak* v. *Chugai Pharm. Co.*, 280 F.3d 1266, 1269-70 (9th Cir. 2002) ("the strong default presumption is that the FAA, not state law, supplies the rules for arbitration"). The court below acknowledged and expressly rejected *Wolsey* based upon its disagreement with the Ninth Circuit's "interpretation of *Mastrobuono*." Pet. App. 9a.

Federal courts thus have adopted conflicting standards such that similarly situated litigants will be treated differently based solely upon where their lawsuits are filed. Further, there can be no question that proper application of the FAA presents an important and recurring issue of federal law. As both the district court and court of appeals recognized, the impact of a choice-of-law provision on the application of the FAA is "a fertile source of debate" and "a recurring and troubling theme" that has resulted in "decisions too varied to mention." Pet. App. 18a, 1a. Review by this Court is thus necessary to ensure the uniform application of the FAA.

Even if the issue of contract interpretation—*i.e.*, whether the parties incorporated California arbitration rules into their agreement to arbitrate—presented a close question, there can be no doubt that it should have be resolved, at a minimum, with appropriate deference to the arbitral panel's refusal to grant a stay of arbitration. See *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 n.4 (1995) (explaining that "arbitrator" is "the only decisionmaker arguably entitled to deference"). In *Howsam* v. *Dean Witter Reynolds, Inc.*, this Court ruled that procedural issues arising out of an arbitration presumptively should be resolved by arbitrators rather than by courts. 537 U.S. 79, 84 (2002). Similarly, in *Green Tree Financial Corp.* v. *Bazzle*, a plurality of this Court, *sua sponte*, held that the issue whether an agreement permitted class arbitration was a disputed issue of contract interpretation that was for the arbitrator to decide. 123 S. Ct. 2402, 2407-08 (2003).

In failing, at a minimum, to afford any weight or deference to the arbitral panel's prior rejection of respondent Security's request for a stay, the decisions below conflict directly with this Court's decisions holding that resolution of procedural questions arising from an arbitration is presumptively the province of arbitrators, not courts. See *Howsam*, 537 U.S. at 84; *Green Tree*, 123 S. Ct. at 2407-08; *PacifiCare Health Sys., Inc.* v. *Book*, 123 S. Ct. 1531, 1535-36 (2003); *Vimar Seguros Y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 541 (1995). Indeed, this case involves a particularly egregious example of overreaching because it is only after the arbitral panel expressly declined to grant a stay, that respondent sought (and obtained) from a court the same relief that the arbitral panel had denied.

THE DECISION BELOW IMPLICATES A DEEP AND PERSISTENT CONFLICT AMONG THE COURTS OF APPEALS AND CONFLICTS WITH DECISIONS OF THIS COURT ON THE ISSUE WHETHER A GENERAL CHOICE-OF-LAW PROVISION INCORPORATES STATE-LAW ARBITRATION RULES.

The decision below warrants further review by this Court because it implicates a deep conflict among the courts of appeals on the question whether a general choice-of-law provision displaces the pro-arbitration protections inherent in the FAA. In rejecting the majority approach, the court below adopted a rule that improperly constricts the scope of the FAA, fails to give effect to the FAA's policy in favor of arbitration, and creates an unnecessarily complex legal regime that forsakes the benefits of arbitration and undermines Congress' efforts to promote resort to arbitration as a quick and efficient means of dispute resolution. Finally, even if this were a close question, the panel below, at a minimum, should have deferred to the arbitral panel's refusal to grant an identical request for a stay of arbitration.

A. The Decision Below Implicates A Mature Conflict On The Issue Whether Federal Arbitration Law Is Rendered Inapplicable By A General State Choice-of-Law Provision.

1. The majority of circuits—including the First, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits—has held that a general choice-of-law clause does not displace application of the FAA in favor of state arbitration rules.

The leading case in the majority is *Roadway*, 257 F.3d at 297 (Becker, C.J.), in which the Third Circuit interpreted a general choice-of-law clause that provided that the contract "'shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania.'" *Id.* at 290. The court concluded that the issue of "contract construction" of an arbitration agreement to which the FAA applied "is *not* governed by state law—it is governed by federal law," *id.* at 294, and held that "a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards," *id.* at 296. The Third Circuit acknowledged that decisions from other circuits were "to the contrary," but adopted the majority standard because it was consistent with "case law from both the Supreme Court and six of our sister circuits." *Id.* at 295-96 & n.4 (citing cases); *id.* at 298 & n.7 (same).

Noting that general choice-of-law clauses were "ubiquitous" in commercial agreements, *id.* at 293, the *Roadway* court explained that such clauses play a vital role in determining which state's contractual law will apply, *id.*, but "speak to an issue wholly distinct" from the issue whether federal law or state law rules will govern arbitration, *id.* at 294. The Third Circuit reasoned that "the presence of a generic choice-of-law clause tells us little (if anything) about whether contracting parties intended to opt out of the FAA's

default standards and incorporate ones borrowed from state law." *Id.* at 296.[3]

Accordingly, the Third Circuit adopted, as a matter of federal law, a default rule designed to (1) "minimize the frequency with which parties will be found to have opted out of the FAA's default regime when they did not intend to do so"; (2) "be easy for arbitrators and district courts to deter[m]ine whether parties have opted out of federal standards"; and (3) "preserve and facilitate the ability of parties to contract around the default federal standards," *id.* at 296-97. The Third Circuit also rejected the view that "contracts containing generic choice-of-law clauses and arbitration clauses should be construed as incorporating all state arbitration rules that are 'procedural' in nature and 'substantive' state arbitration rules that do not 'conflict' with the FAA," *id.* at 298, because such a rule "would unduly complicate the law" and "would not . . . effectuat[e] the intent of most contracting parties," *id.* at 299.

Consistent with *Roadway*, the Ninth Circuit, applying federal law, also has held that under the FAA "a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration." *Sovak*, 280 F.3d at 1270. Rather, the *Sovak* court explained that the Ninth Circuit "will interpret the choice-of-law clause as simply supplying state substantive, decisional law, and not state law rules for arbitration." *Id.*

The decision in *Sovak* reaffirmed the Ninth Circuit's prior holding in *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998). An examination of *Wolsey* underscores the importance of the conflict among the courts of appeals. In *Wolsey*, the Ninth Circuit relied upon *Mastrobuono* (and

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[3] *Roadway* showed that choice-of-law clauses speak to the "horizontal question" "whether the laws of State X or State Y supply the relevant rule of decision," not the "vertical" issue "whether the rule of decision is supplied by the laws of State X or by federal law." 257 F.3d at 293-94.

rejected reliance upon *Volt*) to hold that a choice-of-law clause that provided the agreement "'shall be interpreted and construed under the laws of the State of California,'" *id.* at 1209, did "not incorporate" Section 1281.2(c) of the California Civil Procedure Code—*i.e.*, the very same California statute at issue in this case.[4]

To the same effect is *Ferro Corp.* v. *Garrison Industries, Inc.*, 142 F.3d 926 (6th Cir. 1998). There, the Sixth Circuit reversed a district court's ruling that "by inserting the choice-of-law clause into their arbitration agreement, the parties expressly contracted to be bound by the laws of Ohio, thus precluding application of the FAA." *Id.* at 933. The Sixth Circuit expressly rejected the district court's reliance upon *Volt*, explaining that *Volt* was "distinguishable," and that the district court "was bound to follow the Supreme Court's more recent decision in *Mastrobuono*." *Id.* Applying *Mastrobuono* (and other federal court decisions), the Sixth Circuit held that the choice-of-law provision gave "no indication that the parties intended to incorporate Ohio law" to govern the scope of the agreement to arbitrate. *Id.* at 937.[5]

Most recently, the Fifth Circuit followed the majority approach reflected in *Roadway* to hold that a choice-of-law provision does "not express the parties' clear intent to depart

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[4] Although it recognized the direct conflict between its holding and *Wolsey*, the decision below made no attempt to distinguish *Wolsey*, but instead rejected its holding based upon the Second Circuit's view that the Ninth Circuit improperly "relied on its interpretation of *Mastrobuono* to conclude that the choice-of-law provision did not incorporate section 1281.2(c)(4)." Pet. App. 9a n.4.

[5] The Sixth Circuit highlighted the importance of its holding that a general choice-of-law provision does *not* displace the FAA. 142 F.3d at 937. The *Ferro* court observed that "[m]ost contracts include a choice-of-law clause, and, thus, if each of these clauses were read to foreclose the application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases. Such an interpretation of the FAA is simply not viable, as it would effectively emaciate the Act itself." *Id.* at 938.

from the FAA's vacatur standard." *Action Indus., Inc.* v. *United States Fid. & Guar. Co.*, 358 F.3d 337, 343 (5th Cir. 2004). Relying upon *Mastrobuono*, the *Action* court agreed that "'a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards.'" *Id.* at 342 (quoting *Roadway*, 257 F.3d at 293). The Fifth Circuit explained that its reliance on *Mastrobuono* did not conflict with *Volt* because "the Court's analysis in *Volt* presupposed that the contract had expressed the parties' clear intent to depart from the FAA's rules." *Id.* at 342 n.15. These decisions are in accord with others from the First, Fourth, Eighth and Tenth Circuits.[6]

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[6] *See, e.g., PaineWebber Inc.* v. *Elahi*, 87 F.3d 589, 592, 594 (1st Cir. 1996) ("Following the principles and analysis set forth in *Mastrobuono*" to hold that a choice-of-law clause that required that the "agreement and its enforcement shall be construed and governed by the laws of the State of New York" did not displace the FAA); *Porter Hayden Co.* v. *Century Indem. Co.*, 136 F.3d 380, 382 (4th Cir. 1998) (interpreting *Mastrobuono* as "squarely reject[ing] the argument that a federal court should read a contract's general choice-of-law provision as invoking state law of arbitrability and displacing federal arbitration law"); *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (holding that it would "not interpret an arbitration agreement as precluding application of the FAA unless the parties' intent that the agreement be so construed is abundantly clear"); *Kelley* v. *Michaels*, 59 F.3d 1050, 1055 (10th Cir. 1995) (following *Mastrobuono* to hold that "'the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration'").

Several state courts of last resort also have relied upon *Mastrobuono* to conclude that a general choice-of-law clause will not be read to incorporate state arbitration law. *E.g., Zabinski* v. *Bright Acres Assoc.*, 553 S.E.2d 110, 117 (S.C. 2001) (choice-of-law clause governed the "validity and construction of the contract" but did not incorporate "state, rather than federal, arbitration law"); *L & L Kempwood Assocs., L.P.* v. *Omega Builders, Inc.*, 9 S.W.3d 125, 127-28 (Tex. 1999) (per curiam) (holding that a choice-of-law provision that did not exclude the application of federal law would not be read to incorporate state law governing stays).

2. In stark contrast, the Second Circuit, in the decision below, and the District of Columbia Circuit have held that a general choice-of-law provision is sufficient to opt out of the FAA and into state-law arbitration rules.

In the decision below, the court of appeals affirmed the district court's entry of a stay of all arbitration proceedings on the eve of the arbitration hearing. The court of appeals acknowledged that, under *Mastrobuono*, "as a matter of *federal* law, general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators." Pet. App. 7a. The court below held that *Mastrobuono* did not govern this case because "the procedural provision in question here does not limit an arbitrator's authority." *Id.* But see *Wolsey*, 144 F.3d at 1212 (holding that Section 1281.2(c) "assuredly does affect California's 'allocation of power between alternative tribunals'"). Specifically, the court of appeals ruled that the "federal policy favoring arbitration" did not apply because "section 1281.2(c)(4) is a 'state procedural rule.'" Pet. App. 8a-9a. As a result, the Second Circuit looked exclusively to "California law" to "interpret the choice-of-law provision utilized in this contract." *Id.* at 9a.

In doing so, the court of appeals recognized that its approach and ruling were contrary to that of the Ninth Circuit in *Wosley*. Pet. App. 9a n.4. Indeed, the court below rejected *Wolsey* because it disagreed with the Ninth Circuit's "interpretation of *Mastrobuono* to conclude that the choice-of-law provision did not incorporate section 1281.2(c)(4)." *Id.* Instead, relying upon California decisions, the court of appeals believed that "the California Supreme Court would conclude [that the choice-of-law provision] evidences the parties' intent to incorporate section 1281.2(c)(4)" because "California abides by the general proposition that sophisticated commercial parties intend a generic choice-of-law clause to control the entire agreement." *Id.* at 10a. Reversing the presumption in favor of the FAA set forth in

Mastrobuono, the court of appeals ruled that "[i]f the parties intended for only California substantive law to govern, they could have easily made their intentions clearer with a second exclusion for California's arbitration rules." *Id.* at 11a.

Similarly, the D.C. Circuit has held that a general choice-of-law clause that provided that the agreement "'shall be governed by and construed in accordance with the internal laws of the State of Connecticut'" would be read to displace the FAA's provision setting a three-month limitations period governing "the timeliness of petitions to vacate arbitration awards." *Ekstrom*, 68 F.3d at 1393. Applying District of Columbia "choice of law principles," the court rejected the argument that the FAA rule applied because "neither the choice of law provision nor the arbitration clause contains an *express* agreement to apply the 30-day Connecticut time limit." *Id.* at 1395. Relying upon *Volt*, the *Ekstrom* court held that it could "discern no material difference" between an agreement that "*explicitly* called for the application of Connecticut's 30-day limitation period" and "the actual one in the parties' Merger Agreement calling for the application of Connecticut law." *Id.* at 1396.

3. This case directly implicates this abiding conflict among the federal courts of appeals. If the Second Circuit adopted the majority position as reflected in *Roadway* and *Wolsey*, it unquestionably could not have concluded that California law governed the arbitration of this dispute. The decisions applying the majority approach all have followed this Court's decision in *Mastrobuono* to rule, as a matter of federal law, that a general choice-of-law provision, "standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards." *Roadway*, 257 F.3d at 296.[7]

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[7] *See Action*, 358 F.3d at 342 ("a choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules"); *Sovak*, 270 F.3d at 1270 ("a general

In stark contrast, the court below purported to apply solely state contract law and stated that the "federal policy favoring arbitration" was inapplicable because Section 1281.2(c)(4) was merely a "'state procedural rule.'" Pet. App. 9a. In contrast, courts of appeals adopting the majority approach have made clear that under *Mastrobuono*, the question whether the FAA is displaced by state arbitration law is a question of "federal law." *Roadway*, 257 F.3d at 294 ("this case is *not* governed by state law—it is governed by federal law"); *Action*, 358 F.3d at 342 (following *Roadway*). Indeed, the Third Circuit expressly rejected a proposal whereby "generic choice-of-law clauses and arbitration clauses should be construed as incorporating all state arbitration rules that are 'procedural' in nature." *Roadway*, 257 F.3d at 298-99.

Similarly, the court of appeals relied upon California law, which it concluded "abides by the general proposition that sophisticated commercial parties intend a generic choice-of-law clause to control the entire agreement." Pet. App. 10a; see also *Ekstrom*, 68 F.3d at 1394 (relying upon District of Columbia choice-of-law rules). In contrast, courts in the majority have explained that such provisions shed little light on the question because they "typically embody the parties' choice of one state's laws over another's, rather than express a preference between federal and state law." *Porter Hayden*

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choice of law clause within an arbitration agreement within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration"); *UHC Mgmt. Co.*, 148 F.3d at 997 (explaining that choice-of-law provision that "makes no reference to the Minnesota Uniform Arbitration Act or to Minnesota case law interpreting the allocation of powers between arbitrators and courts" was inadequate to displace FAA); *Ferro*, 142 F.3d at 937 ("the choice-of-law clause is not an 'unequivocal inclusion' of the Ohio rule"); *Porter Hayden*, 136 F.3d at 382 (rejecting argument "that a federal court should read a contract's general choice-of-law provision as invoking state law of arbitrability and displacing federal arbitration law"); *PaineWebber*, 87 F.3d at 594 (general choice-of-law clause did not displace the FAA); *Kelley*, 59 F.3d at 1055 ("'the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration'").

Co. v. *Century Indem. Co.*, 136 F.3d 380, 383 n.5 (4th Cir. 1998); *accord Roadway*, 257 F.3d at 293-94; *Ferro*, 142 F.3d at 983.[8]

Finally, the court below adopted a presumption such that "[i]f the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules." Pet. App. 11a; cf. *Ekstrom*, 68 F.3d at 1394. But that presumption in favor of state arbitration rules is diametrically opposed to the rule adopted by courts in the majority, which, in reliance upon *Mastrobuono*, presume that the FAA will apply unless provided clear evidence to the contrary. See *Roadway*, 257 F.3d at 296 (adopting "default rule" whereby "generic choice-of-law clause, standing alone, is insufficient . . . to opt out of FAA's default standards"); see also *supra* note 1 (citing cases that adopt presumption in favor of FAA).

B. Further Review Is Necessary Because The Decision Below Creates A Substantial Exception To The FAA That Is Unwarranted Under This Court's Decision In *Mastrobuono*.

Review by this Court is necessary because the decision below creates a broad exception to the FAA that is unwarranted as a matter of the parties' intent, conflicts with this Court's decision in *Mastrobuono*, and injects unnecessary

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[8] The choice-of-law provision at issue here underscores this fundamental point by expressly providing that on the issue of "credit for reinsurance" the "rules of all *applicable states* shall pertain thereto." Pet. App. 2a n.2 (emphasis added). As explained by *Roadway*, such a choice-of-law provision addresses "the horizontal question" of which *state*'s laws apply, but has "no applicability" to the "vertical" question of "whether the rule of decision is supplied by the laws of State X or by federal law." 257 F.3d at 293. That conclusion, of course, is the same one reached in *Mastrobuono*, where this Court held that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration." 514 U.S. at 64.

complexity and delay into an arbitral process that Congress sought to promote as an efficient and cost-effective alternative to litigation.

1. The court of appeals' holding—that a general choice-of-law provision should be read not only to substitute for a state's conflict-of-law analysis, but also to opt out of otherwise applicable *federal law*—is not supported by this Court's decisions.

In *Mastrobuono*, this Court held that a general "choice-of-law provision, when viewed in isolation, may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship." 514 U.S. at 59.[9] The Court held that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other." *Id.* at 64. In so ruling, this Court harmonized its prior decision in *Volt* by explaining that *Volt* did not involve contract interpretation, but instead addressed whether the FAA pre-empted arbitration pursuant to state-law rules that the Court *assumed* the parties had intended to incorporate into their agreement. *Id.* at 60 n.4.

Moreover, the approach adopted by the court below would limit the practical impact of the FAA considerably. As noted, the Sixth Circuit has explained, "[m]ost contracts include a choice-of-law clause, and, thus, if each of these clauses were read to foreclose application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases." *Ferro*, 142 F.3d at 938. That limitation of the

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[9] The Third Circuit, in setting forth the majority approach, has echoed the more-limited role of choice-of-law provisions in contracts subject to the FAA, explaining that "few (if any) federal statutes other than the FAA even *permit* parties to opt out of the standards contained in them," and therefore "we are confident that this particular issue rarely occurs to contracting parties *ex ante*." 257 F.3d at 294.

FAA's scope conflicts with this Court's "expansive reading" of the FAA and its conclusion that Congress sought "'broadly to overcome judicial hostility to arbitration agreements.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118-19 (2001) (quoting *Allied-Bruce*, 513 U.S. at 272-73).

2. The decision below also misreads the standards set forth in *Mastrobuono*. There, this Court reaffirmed that, "'as a matter of federal law,'" "when a court interprets [a choice-of-law provision] in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration.'" *Mastrobuono*, 514 U.S. at 62 & n.8 (quoting *Volt*, 489 U.S. at 476, and *Moses H. Cone*, 460 U.S. at 24-25). Here, however, the court of appeals ruled that the "federal policy favoring arbitration" applied only to "restrictions on the parties' substantive rights or the arbitrator's powers," Pet. App. 8a, but did not apply to the "present case" which "does not involve those types of restrictions," *id.* at 9a (stating that Section 1281.2(c)(4) is only a "'state procedural rule'" that "'determines . . . the efficient order of proceedings'").

The notion that the "federal policy favoring arbitration" should not inform the determination whether the parties rejected the FAA in favor of "state *procedural* rules" reflects a profound misunderstanding of the FAA. The "substantive provisions" of the FAA are designed to protect the arbitral *procedures* chosen by the parties. Indeed, the very purpose of the FAA was to allow private parties to "'trade[] the *procedures* and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (emphasis added) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). In this regard, the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or *procedural policies*

to the contrary." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added); see also *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985) (holding that FAA "requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"). The court of appeals' conclusion that the "federal policy favoring arbitration" should not apply to state arbitration procedures is contrary to settled precedent.

Further, the ruling by the court below that Section 1281.2(c) does not restrict an "arbitrator's power" is plainly wrong. Pet. App. 9a; compare *Wosley*, 144 F.3d at 1213. The arbitration clause at issue here addresses the default timing of the proceedings before the arbitral panel and reflects the parties' concern with the expeditious resolution of any dispute through arbitration. Pet. App. 35a-36a. The decision below, at a minimum, upends that schedule and withdraws from the arbitrators any authority to control the timing of the arbitral hearing or the panel's ultimate decision. As Justice White explained, "[b]elated enforcement of the arbitration clause . . . significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement." *Byrd*, 470 U.S. at 225 (White, J., concurring).

Indeed, this case involves direct interference with arbitrators' powers because the arbitral panel fully considered, and rejected, Security's request for a stay of the arbitral hearing in this case pending resolution of the Federal Litigation. Only after failing to obtain relief from that panel did Security seek the same relief from a court. Although it ultimately reached the wrong conclusion, even the district court acknowledged that "[t]his dispute involves the 'allocation of power between alternative tribunals.'" Pet. App. 21a (quoting *Mastrobuono*, 514 at 60); see also *Wolsey*, 144 F.3d at 1212 (Section 1281.2(c) "assuredly does affect California's 'allocation of power between alternative tribunals'" (quoting *Mastrobuno*, 514 U.S. at 64)).

3. Finally, the distinction drawn between the incorporation of "substantive" and "procedural" state law arbitration provisions adopted by the court below is inconsistent with the FAA because it injects an unnecessary level of complexity into an arbitral process whose chief benefits include efficiency and simplicity.

As explained by Third Circuit, distinguishing between "procedural" and "substantive" provisions "would unduly complicate the law in this area." *Roadway*, 257 F.3d at 299. Indeed, whenever a party "complained about multiple issues, at least one of which was 'procedural' and at least one of which [was] 'substantive' (however those terms are defined)," separate determinations would have to be made "balancing and applying multiple legal regimes within the same case." *Id.* Introduction of this additional level of complexity should be rejected in this context because it is unlikely to reflect the actual intent of the parties. As the *Roadway* court explained, it is "most unlikely that any sizeable number of parties would wish to be bound by some federal standards and some state ones." *Id.* What is more, this added complexity would undermine a principal benefit of arbitration, which is designed to provide a "less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995).

C. The Ruling Below Conflicts With Decisions Of This Court And Other Courts Of Appeals Holding That Issues Of Contract Interpretation Should Be Made By, Or Determined With Deference To, The Arbitral Panel.

What makes the court of appeals' holding particularly extreme is that respondent Security asked the arbitral panel to stay its hand in favor of Federal Litigation. The arbitral panel concluded that it was not compelled to do so under the parties' agreement and denied respondent Security's request for a stay. The ruling below thus also warrants further review because it is inconsistent with a host of decisions by this

Court and other federal courts of appeals that hold that arbitrators, and not courts, are presumptively responsible for resolving issues of contract interpretation and procedural questions arising out of an arbitration. See *Mastrobuono*, 514 U.S. at 60 n.4. Under this precedent, if there were any doubt about how the choice-of-law provision should be applied, the arbitral panel's decision refusing to stay its proceedings should have been respected by the courts below.

1. In *Howsam* v. *Dean Witter Reynolds*, 537 U.S. 79 (2002), this Court explained that "procedural questions which grow out of a dispute and bear on its final disposition are presumptively *not* for the judge, but for the arbitrator to decide." *Id.* at 84 (internal quotation marks omitted). Similarly, *Vimar Seguros Y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995), held that a court of appeals "was correct to reserve judgment on the choice-of-law question, as it must be decided in the first instance by the arbitrator." *Id.* at 541 (citation omitted). In *PacifiCare Health System, Inc.* v. *Book*, 123 S. Ct. 1531 (2003), this Court ruled that the arbitrator should first be permitted to interpret the scope of remedial limitations in the arbitration clause because a court should not "take upon [itself] the authority to decide the antecedent question of how [a contract term] is to be resolved." *Id.* at 1535-36. Finally, in *Green Tree*, 123 S. Ct. at 2408, the plurality ruled, *sua sponte*, that "the parties have not yet obtained the arbitration decision that their contracts foresee" and therefore "remand[ed] the case so that the arbitrator may decide the question of contract interpretation." *Id.* at 2407-08 (Breyer, J.).

Howsam, *Vimar Seguros*, *PacifiCare*, and *Green Tree* make clear that "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator," *Howsam*, 537 U.S. at 84 (internal quotation marks omitted), and that such issues include contract interpretation, *PacifiCare*, 123 S. Ct. at 1535-36; *Green Tree*, 123 S. Ct. at 2408 (plurality op.), including the

proper interpretation of a "choice-of-law" provision, *Vimar Seguros*, 515 U.S. at 541.

2. The court of appeals' decision conflicts with this Court's controlling precedent. The arbitration clause at issue provides that "any irreconcilable dispute between the parties to this Agreement shall be submitted for decision to a board of arbitration composed of two arbitrators and an umpire meeting [at] a place to be agreed by the board." Pet. App. 34a. Here, Security sought a stay of arbitration before the arbitral panel. Petitioner TIG opposed that motion because entry of a stay was inconsistent with the parties' agreement, was contrary to the FAA, and would frustrate TIG's right to a speedy and efficient resolution of the arbitral proceedings. Indeed, TIG explained that a stay effectively might "deprive TIG of its contractual right to arbitrate." Opposition to Stay at 5. After considering the opposing positions on this dispute, the arbitral panel agreed with TIG and rejected Security's request for a stay.

Undeterred, Security then sought the same relief in the Federal Litigation. Over TIG's objections, and in direct conflict with the arbitral panel's ruling, the district court and court of appeals independently sought to address an "irreconcilable dispute between the parties" on the question whether the parties' arbitration agreement authorized and warranted entry of a stay. *E.g.*, Pet. App. 27a n.10 (district court's ruling that arbitral panel's refusal to grant stay had no "preclusive effect" on its entry of a stay). Under the arbitration agreement and binding precedent, the court below was obligated either to allow the arbitral panel to decide whether the parties had intended to incorporate state arbitration rules into their arbitration agreement, or, at a minimum, to afford appropriate deference to the arbitral panel's refusal to grant a stay pending litigation. Its failure to do so cannot be reconciled with *Howsam* or *Green Tree*.

Further, the decision below also creates a conflict among the court of appeals on the question whether arbitrators or

courts should resolve issue of contract interpretation relating to the conduct of the arbitration. In *Bailey* v. *Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003), the Eighth Circuit applied *Howsam* to concluded that "the extent of an arbitrator's procedural and remedial authority are issues for the arbitrator to resolve in the first instance." *Id.* at 824. Similarly, in *Pedcor Mgmt. Co. Welfare Benefit Plan* v. *Nations Personnel of Texas, Inc.*, 343 F.3d 355, 363 (5th Cir. 2003), the Fifth Circuit, held that on the question of contract construction, "pursuant to *Green Tree*, arbitrators should decide whether class arbitration is available or forbidden." *Id.* at 363. Finally, in *Anders* v. *Hometown Mortgage Services, Inc.*, 346 F.3d 1024 (11th Cir. 2003), the Eleventh Circuit, relying upon *Green Tree* and *Howsam*, concluded that "an arbitrator and not a court" should address whether "remedial restriction provisions" contained in the agreement were "valid as written" or "must be removed under the forgiving eye of the severance clause." *Id.* at 1032-33.

The failure of the court below to be bound by (or give appropriate deference to) the arbitral panel's ruling that a stay was not warranted under the parties' agreement conflicts with decisions of this Court and other federal courts of appeals and thus warrants further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 8, 2004